82-1614

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BLAZER CORPORATION,

Petitioner,

—v.—

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. MCCRAINE and "JOHN DOES", said names being fictitious,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: March 29, 1983

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

The following issues are presented for review of this petition:

1. Whether state statutes of limitation which extend special status to public agencies or officials may be "borrowed" to exclude liability for deprivations alleged under 42 U.S.C. § 1983.

2. Whether the Courts below erred in creating an expansive interpretation of the "respondeat superior" exclusion from 42 U.S.C. § 1983 liability so as to prevent the imputation of public agency wrongdoing to members of a public agency and to immunize such members from liability for passive or culpable neglect.

3. Whether the Courts below erred in creating an exclusion from the 42 U.S.C. § 1983 liability of a public agency chief executive for failure to perform statutorily mandated acts, because they are part of "an administrative plan to help the state regulate its officers' conduct."

4. Whether post-deprivation remedies under the New Jersey Eminent Domain and Relocation Benefits statutes existed sufficient to cure the deprivation of petitioner's rights to due process and equal protection of law.

TABLE OF CONTENTS

PAGE

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED .. 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THE CASE INVOKES ... 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

1. Granting New Jersey Tort Claims Act statute of limitations protection to the respondent Sports Authority conflicts with applicable decisions of this Court which deny the protection of sovereign immunity to such agencies in cases under 42 U.S.C. § 1983 8

2. A conflict among the Circuits exists with respect to the Tort Claims Act statute of limitations issue, which should be resolved by this Court 11

3. The decisions below interpreting the scope of the *respondeat superior* exclusion from § 1983 liability is in conflict with this Court's decision in *Monell v. Dept. of Soc. Serv. of the City of New York*, 436 U.S. 690 (1978) 15

PAGE

4. Whether there should be an exclusion of liability for administrative acts to regulate agency conduct should be settled by this Court to prevent an unwarranted dilution of the effectiveness of 42 U.S.C. § 1983 18

5. The scope of this Court's decision in *Parratt v. Taylor* with respect to the extent to which the availability of postdeprivation remedies may cure due process violations should be settled by this Court 19

CONCLUSION 20

APPENDIX:

New Jersey Eminent Domain Act of 1971 ..... 1a

New Jersey Relocation Assistance Act of 1971 ..... 2a

New Jersey Relocation Assistance Act of 1967 ..... 3a

New Jersey Tort Claims Act 7a

Rules and Regulations Adopted by (New Jersey) Department of Community Affairs, Chapter VI, ¶ 78 ..... 8a

Rules and Regulations Adopted by (New Jersey) Department of Community Affairs, Chapter 2, 3(a)(3) 11a

42 U.S.C. § 1983 ..... 12a

Decision of Chief Judge Clarkson S. Fischer dated February 9, 1981 ..... 13a

Decision of Judge Harold A. Ackerman dated November 16, 1981 ..... 16a

PAGE

Decision of Judge Harold A. Ackerman dated March 1, 1982 ..... 25a

Judgment of the Court of Appeals for the Third Circuit dated December 2, 1982 ..... 35a

Order Denying Motion for Hearing En Banc dated December 29, 1982 ..... 38a

TABLE OF AUTHORITIES

Cases	PAGE
Ammburg v. City of Chester, 494 F.2d 811 (3rd Cir. 1974)	10
Bell v. Bell, 83 N.J. 417 at 423, 416 A.2d 829 (1980)	10
Board of Regents v. Tomanio, 446 U.S. 478 (1980)	9
Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946)	7
Cordeco Devel. Corp. v. Vasquez, 539 F.2d 256 (1st Cir. 1976) *cert. denied*, 429 U.S. 978	7
Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970)	11, 13, 14
Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981) *cert. granted*, 102 S.Ct. 1426, *cert. dismissed*, ____ U.S. ____	7, 19
Erdmann v. Board of Ed., Union Co. 541 F.Supp. 388 (D.N.J. 1982)	14
Gipson v. Bass River, 82 F.R.D. 122 (D.N.J. 1979)	14
Gunther v. Miller, 498 F.Supp. 882 (D.N.M. 1980)	14
Johnson v. Railway Express Agency, 421 U.S. 454 (1975)	9
Lake Country Estates Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979)	9, 11, 18
Landon v. Plasencia, U.S. 103 S.Ct. 321 (1982)	7
Malloy v. State, 76 N.J. 515, 388 A.2d 622 (1978)	10
McFarland v. American Sugar Ref. Co. 241 U.S. 79 (1916)	7
Monell v. Dept. of Soc. Serv. of the City of New York, 436 U.S. 658 (1978)	8, 9, 10, 11, 13, 15, 17
Monroe v. Pape, 365 U.S. 167 (1961)	12

PAGE

Naughton v. Bevilacqua, 605 F.2d 586 (1st Cir. 1979) .. 17

Ney v. State of California, 439 F.2d 1285 (9th Cir. 1971) 13

Occidental Life Ins. Co. of Calif. v. E.E.O.C., 432 U.S. 355 (1977) 11

Owen v. City of Independence, 445 U.S. 622 (1980) *rehearing denied*, 446 U.S. 993 .....8, 9, 11, 15

Parratt v. Taylor, 451 U.S. 527 (1981)..... 19

Pauk v. Board of Trustees of City U. of New York, 654 F.2d 856 (2d Cir. 1981) *cert. denied*, 455 U.S. 1000 .. 13

Perrote v. Percy, 452 F.Supp. 604 (E.D.Wis. 1978)..... 14

Peters v. Township of Hopewell, 534 F.Supp. 1324 (D.N.J. 1982) 14

Peterson v. Fink, 515 F.2d 815 (8th Cir. 1975)..... 12

Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980) 13

Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977) 13

Skrapits v. Skala, 314 F.Supp. 510 (N.D.Ill. 1970)..... 14

Snowden v. Hughes, 321 U.S. 1 (1944)..... 7

Swan v. Board of Higher Education, 319 F.2d 56 (2d Cir. 1963)..... 13

Taylor v. Mayone, 626 F.2d 247 (2d Cir. 1980) 12, 13

United States v. Jiles, 658 F.2d 194 (3rd Cir. 1981) *cert. denied*, 455 U.S. 923 18

Willis v. Dept. of Conservation Devel., 55 N.J. 534, 264 A.2d 34 (1970)..... 10

Statutes and Court Rules:

United States Code:

Title 28:

Section 1254(1) 2

PAGE

Section 1331(a) 6

Section 1343..... 6

Title 42:

Section 1983....2, 6, 8, 10, 11, 12, 13, 15, 17, 18, 19, 20

New Jersey Statutes Annotated:

20:3-1 3

20:3-19 6

20:4-1 3

20:4-4(a)(2)..... 4

20:4-4(a)(3)..... 4

20:4-10(a)(2)..... 3, 6

52:31B-1..... 3, 16

52:31B-5..... 5

59:8-8 9

Other Authorities:

New Jersey Eminent Domain Act of 1971 (P.L. 1971, Ch. 361)..... 3

Relocation Assistance Act of 1971 (P.L. 1971, Ch. 362)..... 3

Relocation Assistance Law of 1967 (P.L. 1967, Ch. 79)..... 3

Rules and Regulations of New Jersey Department of Community Affairs:

Ch. 6 ¶ 78 4

Ch. 2 § 3a(3) 16

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BLAZER CORPORATION,

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NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. MCCRAINE and "JOHN DOES", said names being fictitious,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Blazer Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 2, 1982.

OPINIONS BELOW

The judgment of the Court of Appeals is reproduced in the Appendix hereto at p. 36a. The unreported opinions of the District Court for the District of New Jersey from which appeal was taken dated November 16, 1981 and March 1, 1982, are also reproduced in the Appendix hereto at pp. 16a and 26a respectively.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

On December 2, 1982, the Court of Appeals for the Third Circuit entered its judgment in the matter for which review is sought on this petition. On December 29, 1982, the Court of Appeals entered its order denying petitioner's application for rehearing and for other relief. Jurisdiction to seek the writ of certiorari prayed for in this petition is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THE CASE INVOKES

Relevant Constitutional provisions, statutes, and regulations are quoted verbatim in the appendix annexed to this petition.

STATEMENT OF THE CASE

Petitioner, a small business dislocated and forced into bankruptcy so that Respondent New Jersey Sports and Exposition Authority (Sports Authority) could build a racetrack-stadium-sports arena complex, asserted claims pursuant to 42 U.S.C. § 1983 complaining of a systematic deprivation of New Jersey statutory relocation benefits. Petitioner contends that its constitutional rights to procedural due process (entitling it to timely notice of available benefits), substantive due process (entitling it to a fairly administered eminent domain system consistent with statutory mandates), and equal protection of the laws (entitling it to the same access to benefits which other agencies, which properly follow statutory mandates, extend to New Jersey property owners) have been violated by the systematic failure of the respondent Sports Authority, its chief executive (respondent Werblin) and the members of its Board (respondents Serraino, Foley, Kugler, Lewis, McCrane and Werblin) to carry out the mandates of the relevant New Jersey statutes and regulations. The Courts below granted summary

judgment dismissing all respondents on non-substantive grounds, including defenses of the statute of limitations (with respect to the Sports Authority only) and non-liability for the acts of subordinates under the doctrine of *respondeat superior.*

Deprivation of State Statutory Rights

The State of New Jersey has adopted a comprehensive statutory scheme securing to real property owners a series of rights in the event their property is taken by eminent domain. These statutory guarantees are set forth in the New Jersey Eminent Domain Act of 1971 (Chapter 361, Laws of 1971 N.J.S.A. 20:3-1 et seq.), the Relocation Assistance Law of 1967 (P.L. 1967, Chapter 79, N.J.S.A. 52:31B-1 et seq.), and the Relocation Assistance Act of 1971 (P.L. 1971, Chapter 362, N.J.S.A. 20:4-1, et seq.) (Relevant sections of said statutes are set forth in the appendix annexed hereto.) The statutes are implemented by a series of Regulations promulgated pursuant to statutory authority by the New Jersey Department of Community Affairs.

Among the rights guaranteed to property owners about to be displaced are the right to prompt payment of authorized relocation benefits and in "hardship cases", the right to such payments "in advance" of the property owner's removal from its premises. N.J.S.A. 20:4-10(a)(2) (A. 2a).* Petitioner was never given notice of the existence of this statutory right, and as a result of its displacement by eminent domain, it

> ". . . was compelled and driven first into receivership and then into bankruptcy, with a total loss of its business including, but not limited to, inventory, personal property, good will, ability to finance its business, and loss of contracts . . ." (Amended Complaint ¶ 28 (R. 837a)).

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* References in this Petition to materials contained in the appendix annexed hereto are designated by the abbreviation "A" followed by relevant page numbers. References to the record below which is comprised of two volumes entitled "Appendix on Behalf of Plaintiff Appellant" are designated by the abbreviation "R" followed by the relevant page number.

Also among the statutory rights conferred upon New Jersey displaced property owners is the right to payment for direct losses of tangible personal property such as inventory or work in process. N.J.S.A. 20:4-4(a)(2) (A. 2a). Petitioner was never given notice of its right to these benefits; it was never offered or paid any such benefits; and it lost personal property and inventory through destruction, theft and vandalism. (Amended Complaint ¶ 29 R. 837a)

Also among the rights of New Jersey displaced property owners is the right, pursuant to adminstrative regulation, to recover payment for physical and structural changes at its new location. Rules and Regulations of New Jersey Department of Community Affairs, Ch.6 ¶ 78 promulgated pursuant to Relocation Assistance Act of 1971 (A. 8a-10a). Petitioner was never given notice of its right to such a payment. No offer was made, and indeed, misrepresentations were made by certain respondents that petitioner would not be entitled to be paid for physical or structural changes at a new location. As a consequence, petitioner was unable to find a suitable new location, which contributed to the destruction of its business. (Amended Complaint ¶¶ 30 and 31 (R. 837a)).

Also among the stautory rights of a displaced property owner which were denied to petitioner was the right to be paid for reasonable expenses in searching for a replacement business (N.J.S.A. 20:4-4(a)(3) (A. 2a)).

New Jersey's Statutory Scheme of Administrative Accountability

In order to assure that state agencies focus upon the needs, interests and statutory rights of property owners to be displaced by eminent domain, New Jersey also requires that before any dislocation of property owners, agencies must *formulate* and implement an approved Workable Relocation Assistance Program (WRAP). Such a program must include:

> " . . . such measures, facilities, techniques or services as may be necessary. . . to determine the needs of displaced

> persons and business concerns for relocation assistance . . . and to assist in minimizing hardships . . . (3) to assist owners of displaced business concerns in obtaining and becoming established in suitable business locations; . . . (5) and to provide for fair and reasonable relocation assistance payments pursuant to Section 4 . . ." N.J.S.A. 52:31B-5 (A. 3a).

Respondents failed to forumulate a proper WRAP, in that the procedures they devised failed to contemplate and provide for the statutory benefits discussed above. (See Amended Complaint ¶¶ 20 and 21 (R. 835a)).

To secure further the rights conferred upon property owners by the New Jersey eminent domain statutes and to insure administrative accountability, N.J.S.A. 52:31B-5 mandates upon the chief executive officer of any state agency acquiring property for public use the obligation to certify to the Commissioner of the Department of Community Affairs ". . . that a workable relocation assistance program (WRAP) for displaced concerns, offering the . . . [statutorily mandated] services . . . is available to reduce hardship to those affected." N.J.S.A. 52:31B-5 (A. 3a). Implicit in such a requirement of course is the duty conferred upon an agency chief executive to review proposed programs to assure that their provisions comply with statutory requirements. The respondent chief executive David A. Werblin failed to certify such a program. Consequently approval of the program was never properly based upon the *informed certification* of the chief executive, as was also required by the statutory scheme. (Amended Complaint ¶ 54(b) R. 843a). Thus petitioner was deprived of the benefit of administrative review and screening by the respondent Werblin and informed approval by the Commissioner of the Department of Community Affairs. Had such screening, review and informed approval taken place, it could well have revealed and corrected the deficiences noted above.

In purported implementation of its uncertified relocation program, the Sports Authority and other respondents engaged

in and countenanced a pattern of failures to satisfy other mandated requirements, which included a failure to inform petitioner of the relocation benefits and assistance available, a failure to determine the extent of petitioner's need for assistance, a failure to provide current and continuing information on the availability of prices and locations of comparable commercial properties. Amended Complaint ¶ 22 (R. 835a-836a)

Among the more stunning institutional failures to satisfy express statutory requirements respondent Werblin caused a booklet entitled "If I Must Move" to be disseminated to relocatees through subcontract with the New Jersey Department of Transportation. *The* pamphlet was distributed to targeted property owners, ostensibly to advise them fully of their rights. *It* failed, among other things, to notify and alert property owners to the availability of advance relocation benefits in hardship cases. N.J.S.A. 20:4-10(a)(2) (A. 2a). (See also opinion at 30a), text of booklet reproduced at R. 559-567a).

Petitioner was evicted from its premises without ever receiving notice of the mandated benefits described above, and without knowledge of the deficiencies in WRAP certification and approval described above, in violation of the express provisions of N.J.S.A. 20:3-19, (A. 1a), *that section* requires that an eviction may take place only upon a judicial determination that the property owner has had adequate opportunity to obtain funds and expenses to which the law entitles it. (Amended Complaint ¶ 12, (R. 832a-833a)).

The Lawsuit

In this action commenced under 42 U.S.C.§ 1983,* petitioner complains of the entire panoply of statutory denials. The underlying property rights include petitioner's right to possession of its real property and its right to relocation benefits under the applicable New Jersey statutes. Petitioner seeks damages resulting from the failure of the Sports Authority to timely apprise it of its rights to benefits and for unlawful

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* Jurisdiction in the District Court below was originally invoked pursuant to 28 U.S.C. § 1343 and 1331(a).

termination of possession of its property. The resulting losses included petitioner's insolvency and the destruction of its business and goodwill. It has asserted that the respondents' conduct denies its Fourteenth Amendment constitutional rights to:

a) procedural due process in that it was never notified of valuable statutory rights to relocation benefits so as to enable it to claim and timely receive them in order to salvage its business from bankruptcy;

b) a procedural due process right to administrative screening and certification, derived from the statutory obligation of respondent Werblin to screen and certify a WRAP relocation plan conforming to state statutory mandates;

c) procedural due process which should have imposed the burden of proof upon respondent Sports Authority at its judicial eviction hearing to establish that the requirements of WRAP certification and approval had been satisfied (*Landon v. Plasencia*, __ U.S. __ (1982), 103 S.Ct. 321);

d) substantive due process in that the wholesale deprivations of petitoner's rights and undermines the basic fairness and integrity of the eminent domain system (See *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. granted* 102 S.Ct. 1426, *cert. dismissed* ____ U.S. ____;

e) equal protection of the laws in that the pattern of official misfeasance referred to above results in discrimination against petitoner and all property owners dislocated by the respondent Sports Authority, since it systematically denies to them the statutory benefits which the legislature intended to confer upon all property owners. See *Snowden v. Hughes*, 539 F.2d 256 (1st Cir. 1976); *Cordeco Devel. Corp. v. Vasquez*, 539 F.2d 256 (1st Cir. 1976); *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946); *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79 (1916).

Dismissal in the District Court

Without grappling directly with the merits of petitioner's claims, the District Court below, piecemeal, has dismissed all of the respondents. In a decision dated November 16, 1981, respondent Sports Authority was granted the benefit of a two year statute of limitations under the New Jersey Tort Claims Act (A. 16a-25a) (Relevant provisions are set forth in the appendix attached hereto at 7a). Later, in a decision dated March 1, 1982, respondents members of the Sports Authority were dismissed because the allegations against them were construed as seeking to impose liability for the acts of subordinates on a *respondeat superior* theory not supportable under § 1983 interpretations (A. 26a-31a)). And respondent Werblin was dismissed upon the ground that his failure to screen and certify the agency-wide WRAP relocation program did not deny petitioner any constitutional rights but instead was only a part of an administrative plan to help New Jersey regulate official conduct. (A. 31a-35a).

On appeal, the Third Circuit, without opinion, cryptically affirmed the decisions below. (A. 36a-38a)

For the reasons which follow, Petitioner respectfully submits that the dismissal of all of the respondents was erroneous, involves substantial departures from § 1983 doctrine, and presents significant issues for decision by this Court.

REASONS FOR GRANTING THE WRIT

1. Granting New Jersey Tort Claims Act statute of limitations protection to the respondent Sports Authority conflicts with applicable decisions of this Court which deny the protection of sovereign immunity to such agencies in cases under 42 U.S.C. § 1983

This Court has repeatedly proclaimed that a public body is a "person" under the terms of 42 U.S.C. § 1983 and not entitled to immunity except in rare circumstances not applicable here. *Monell v. Dept. of Soc. Serv. of the City of New York*, 436 U.S. 690 (1978) (local government bodies), *Owen v. City of*

Independence, 445 U.S. 622 (1980), and *Lake Country Estates Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (public agencies). No effort has been made by respondents below, nor, we submit, would one have prevailed, to contend that the Sports Authority was structured with a specific intent to enable it to enjoy the protection of state sovereign immunity. See *Lake Country Estates, supra* at 401-402. Accordingly the Sports Authority, like municipalities in *Monell* and *Owen, supra* must be construed as a "person" in the parlance of Section 1983. As this Court elaborated in *Owen*,

> "By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and Laws, Congress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed." 445 U.S. at 647-48.

This case presents a prime example of a departure from *Monell, Owen* and *Lake Country, supra*, since the Courts below applied a six year statute of limitations to the individual respondent "persons" (denying their motion to dismiss on limitations grounds) and applied a two year statute to the respondent Sports Authority (granting its limitations dismissal motion). The sole distinction justifying the application of different statutes was the status of the Sports Authority as a public agency. We submit that in reaching this result, the Courts below, contrary to the above authorities, improperly bestowed upon the Sports Authority a status paramount to that of the individual "persons" before it.

Purporting to follow the "resemblance" test standard authorized in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) for purposes of borrowing local statutes of limitations, the District Court held that the Sports Authority was protected by the two year limitations period of the New Jersey Tort Claims Act, N.J.S.A. 59:8-8 (A. 7a). In establishing a limitations period,

that Act does not focus upon the nature of the tortious conduct. It merely provides that:

> "The claimant shall be forever barred from recovering against a public entity if . . . (b) two years have elapsed since the accrual of the claim."

When it denied the limitations claims of individual respondents, the court ruled that the § 1983 constitutional tort most resembles the tort of "unjustified interference with right to pursue lawful business relations, which is subject to a six year limitations period." (A. 20a-23a). However, with respect to the Sports Authority, the Court characterized the claim as being one ". . . for tortious injury to property at the hands of a public authority." (A. 20a), subject to a two year limitation period.

Although the District Court thought it was merely applying the authorized resemblance test, what it in fact did when it incorporated the New Jersey Tort Claims Act was to "borrow" a portion of sovereign immunity. New Jersey's Tort Claims Act is clearly a child of the sovereign immunity doctrine. Its inception came in response to the New Jersey Supreme Court's decision in *Willis v. Dept. of Conservation Development,* 55 N.J. 534, 264 A.2d 34 (1970) which denied sovereign immunity protection for tort claims but invited the Legislature to define the limits of tort liability. The basic approach of the Act is to re-establish sovereign immunity against tort claims except where the Act otherwise provides. See *Bell v. Bell,* 83 N.J. 417 at 423, 416 A.2d 829 (1980); *Malloy v. State,* 76 N.J. 515 at 518, 388 A.2d 622 (1978).

The resemblence test can be accommodated with the *Monell* doctrine by limiting it to an evaluation of the nature of the tortious *character of the wrongs complained of,* excluding as irrelevant the *character of the targeted defendant* as either a private person or a public agency. See *Ammburg v. City of Chester,* 494 F.2d 811 (3rd Cir. 1974); ". . . the applicable statute of limitations must be determined from the nature of the conduct involved" *Id.* at 814. Only in this manner can any

meaning be preserved to the clear declaration in *Monell* that local governments (and government agencies, see *Lake Country Estates, Inc., supra*), ". . . like every other § 1983 'person', by the very terms of the statute, may be sued for constitutional deprivations" 436 U.S. at 690-91.

Permitting state agencies or municipalities to claim the benefit of state Tort Claims Acts is also tantamount to granting them Eleventh Amendment immunity from suit, contrary to this Court's holding in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979) that Eleventh Amendment immunity is not to be conferred:

> "[U]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves." 440 U.S. at 401

No evidence of such an intent appears in the record below, and the Court's decision thus cannot be bolstered on this issue.

As the Court has mandated in the past:

> "State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute."
>
> *Occidental Life Ins. Co. of Calif. v. E.E.O.C.,* 432 U.S. 355 (1977) at 367

That directive has been violated by the Courts below, and petitioner respectfully requests that this Court issue the writ in order to review the matter.

2. A conflict among the Circuits exists with respect to the Tort Claims Act statute of limitations issue, which should be resolved by this Court.

An additional special and important reason exists supporting this petition. There is a distinct conflict between the statute of limitations decision below and decisions in other circuits. Long before this Court's decisions in *Monell* and *Owen* (but indeed presaging their reasoning) the Ninth Circuit put this very issue to rest in *Donovan v. Reinbold,* 433 F.2d 738 (9th Cir. 1970).

In rejecting the applicability to Section 1983 litigation of limitations provisions in the California Tort Claims Act, the Court reasoned that Congress has

> ". . . never indicated an intent to engraft onto the federal [1983] right state concepts of sovereign immunity or of state susceptibility to suit, which are the concepts that are the roots of the California Tort Claims Act. Indeed the history of Section 1983, summarized in *Monroe v. Pape*, supra, 365 U.S. 167 . . . vividly demonstrates that state concepts of sovereign immunity were alien to the purposes to be served by the Civil Rights Act . . . An incorporation of such state created policies would practically constitute a judicial repeal of the Civil Rights Act." 433 F.2d at 742.

The Court in *Donovan* also concluded that the nature of relief sought in 42 U.S.C. § 1983 was of a distinctly different order than that covered by the California Tort Claims Act, and therefore not subject to the provisions of the local statute, citing the concurring opinion of Mr. Justice Harlan in *Monroe v. Pape*, 365 U.S. 167 (1961) at 196;

> ". . . a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." at 196

On the other hand, the Eighth Circuit appears to follow the rule adopted by the Third Circuit below. *Peterson v. Fink*, 515 F.2d 815 (8th Cir. 1975).

In the Second Circuit, however, *Taylor v. Mayone*, 626 F.2d 247 (2d Cir. 1980) refused to apply to a 1983 claim, a one year New York statute of limitations for a sheriff, coroner or constable ". . . upon a liability incurred by him by doing an act in his official capacity or by omission of an official duty" (N.Y.C.P.L.R. § 215(1)) upon essentially the same grounds as those asserted above in support of the writ which petitioner here seeks. The Second Circuit's decision in *Taylor* relied upon

its earlier decision in *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980), which had refused to apply the one year-ninety day limitation period of Section 50-(i) of New York's General Municipal Law. That statute applied to a municipality and its employees for personal injury by reason of the wrongful act of any of its officers, agents, or employees. As the *Quinn* court aptly observed in justifying its opinion:

> "In *Monell, supra,* the Supreme Court held that a municipality is a "person" for purposes of § 1983. Since 1963, this Court has consistently stated that § 214(2) [three year general tort statute of limitations] applies in § 1983 suits against "persons", see *Swan v. Board of Higher Education,* 319 F.2d 56 (2d Cir. 1963), even though § 50-(i)(1) includes, within its terms, city officers, agents, and employees. To create different limitations periods for two similarly situated classes of defendants would create a distinction without a difference, and would engender unnecessary confusion for litigants and judges alike. Thus, we hold that the most appropriate limitations period for suits against municipalities under § 1983 is that which has been heretofore applied in actions against individual municipal officers and employees." 613 F.2d at 449

Issues involving special limitations periods for torts of public officials continue to recur among the Circuits in 1983 actions. The Ninth Circuit has been required to repeat its *Donovan v. Reinbold* ruling on the inapplicability of the California Tort Claims Act limitation provision. *Ney v. State of California,* 439 F.2d 1285 (9th Cir. 1971). Similarly, in *Shouse v. Pierce County,* 559 F.2d 1142 (9th Cir. 1977) the Ninth Circuit rejected (construing it as a "claims" statute rather than a limitations statute) a ninety day municipal and public officer liability limitations statute, citing *Donovan v. Reinbold, supra.*

In *Pauk v. Board of Trustees of City U. of New York,* 654 F.2d 856 (2d Cir. 1981), the Second Circuit was confronted with still another variation of the issues decided earlier in *Taylor, supra.* There the Court observed that:

> "It would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights." *Id.* at 862

In so holding, the Court also emphasized the strong interest in establishing uniformity with respect to the issue of what limitations period to apply.

District Courts also continue to be plagued by the same issues. In addition to the two New Jersey District decisions which reached decisions contrary to the one adopted by Third Circuit below on the applicability of the New Jersey Tort Claims Act (*Peters v. Township of Hopewell,* 534 F.Supp. 1324 (D.N.J. 1982); *Erdman v. Board of Ed., Union Co.,* 541 F.Supp. 388 (D.N.J. 1982)), see *Gunther v. Miller,* 498 F.Supp. 882 (D.N.M. 1980) (following *Donovan v. Reinbold, supra* and holding 1983 action not governed by a limitations provision in New Mexico Tort Claims Act); *Perrote v. Percy,* 452 F.Supp. 604 (E.D.Wis. 1978) (90 day attorney general notice of claim statute for suits against state officers not applicable to 1983 actions); *Skrapits v. Skala,* 314 F.Supp. 510 (N.D.Ill. 1970) (six month notice of claim statute inapplicable to 1983 actions). A contrary result, consistent with the District Court's opinion adopted by the Third Circuit below, was reached in *Gipson v. Bass River,* 82 F.R.D. 122 (D.N.J. 1979).

The fact that issues involving public body and public employee special statutes of limitations continue to recur, even in Circuits which have definitively decided the issue, indicates the unsettled status of the law in this area and constitutes additional support for the granting of the writ sought here. Because of this, and because of the conflict among the Circuits in resolving the issue, petitioner respectfully prays that the writ be issued.

3. The decisions below interpreting the scope of the *respondeat superior* exclusion from § 1983 liability is in conflict with this Court's decision in *Monell v. Dept. of Soc. Serv. of the City of New York*, 436 U.S. 690 (1978)

Some time ago, this Court expressly held that a public body:

> ". . . cannot be held liable solely because it employs a tortfeasor—or in other words . . . [it] cannot be held liable under § 1983 on a *respondeat superior* theory."

Monell v. Dept. of Soc. Serv. of the City of New York, 436 U.S. 658 (1978) at 691, because § 1983 imposes liability only when a "person" subjects or 'causes' another to be subjected to a deprivation of rights. Therefore, it is only when

> ". . . execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id* at 694. See also *Owen v. City of Independence*, 445 U.S. 622 (1980) at 655.

In this case the District Court adopted an expansive view of *respondeat superior* which emasculated the scope and protection of the Civil Rights Statute. From a review of its opinion on the matter, the District Court apparently concluded that individual respondents, members of the Sports Authority, could not be liable for passive deprivations of rights, observing that they could only be liable for their own

> ". . . conduct or participation in a pattern of violations by virtue of knowledge, acquiescence, support and encouragement." (A. 29a).

Such a construction improperly excludes the situation in which a defendant "causes" a plaintiff to be deprived of rights through non action or culpable neglect. That construction is inconsistent with this Court's reasoning in *Monell*.

The District Court below also ruled that:

> "to hold these defendants liable for the *actions of the Authority,* or D.O.T. employees under the circumstances, is to base liability, in my judgment, on the doctrine of *respondeat superior.*" (A. 30a) (emphasis added)

Such a definition stands the theory of *respondeat superior* upon its head, so as to exonerate public officials for any conduct of the agency for which they are employees. Again, we respectfully submit that this was not the intended meaning of *respondeat superior* as that term was used by this Court in *Monell.* (Indeed it suggests a new doctrine of *respondeat inferior*!) Because the precise scope of the term is unclear, petitioner submits that the writ should be granted in order to prevent an unrestrained expansion of the term "respondeat superior" from consuming the protective power of the Civil Rights Act.

In fact, the record clearly supports a *prima facie* case of liability in accordance with this Court's ruling in *Monell, supra.* The Court below specifically found the Sports Authority's WRAP plan to be deficient in that it ". . . did not contain a proper eviction policy." (A. 30a). Moreover, the official publication "If I must move did not inform dislocatees of the availability of hardship advance payments (A. 30a). Among other things, the applicable rules and regulations also provide with respect to the WRAP plan:

> "Whether or not the agency responsible for the displacement administers relocation activities, the local agency has the obligation to assure that relocation assistance and payments are provided in accordance with State law and policies, standards and regulations." N.J.D.C.A. Rules and Regulations, Ch.2§ 3a(3), quoted at A. 11a).

Respondents also caused the dissemination (through subcontract with the New Jersey Department of Transportation) of a booklet which failed to apprise prospective dislocatees of their rights, including their rights in hardship cases to advance

payment of benefits, and the failure (in the case of respondent chief executive Werblin) to screen and certify the WRAP plan as part of a procedure to assure that the relocation statutes are being effectively executed.

Respondents were members of the local agency—the Sports Authority. As such, the duty devolved upon them to see that the WRAP plan and relocation procedures conformed to statutory requirements. Respondent Werblin was additionally mandated with the express duty to certify the WRAP plan to the Commissioner of the Department of Community Affairs.

Clearly the principal deficiencies complained of in this action are institutional in scope and nature. In the words of the First Circuit, they are

> ". . . so pervasive that the agency head, because of his statutory duties and powers, must be considered a responsible party . . . *Naughton v. Beviliacqua,* 605 F.2d 586 (1st Cir. 1979) at 589.

They are not sporadic incidents over which an agency head (or agency members) might not have knowledge or control. The liability of the individual respondents for the above agency deficiencies is not vicarious. It is direct. In the parlance of the *Monell* decision, the inaction of the individual respondents, in violation of their statutory and constitutional duties, constituted the

> "execution [or more appropriately the non-execution] of a government's policy or custom . . . by those whose edicts or acts may fairly be said to represent official policy." *Monell v. Dept. of Soc. Serv. of City of New York,* 436 U.S. 690 (1978) at 694.

which inflicted petitioner's injury. It was improper for the Court to rule to the contrary, at least at the summary judgment stage of the proceedings. In order to prevent the erosion of the effectiveness of § 1983 by providing a loosely controlled *respondeat superior* escape hatch, this Court should grant the writ of certiorari for which petitioner prays.

4. Whether there should be an exclusion of liability for administrative acts to regulate agency conduct should be settled by this Court to prevent an unwarranted dilution of the effectiveness of 42 U.S.C. § 1983

The District Court also improperly dismissed the respondent Werblin, chief executive of the Sports Authority on the theory that his failure to certify the WRAP relocation plan to the New Jersey Commissioner for Community Affairs did not involve a property right of petitioner but was instead merely a part of a plan to ". . . help the state regulate its officers' conduct." (A. 34a). The Court's reasoning on this issue was based upon a Third Circuit decision entitled *United States v. Jiles*, 658 F.2d 194 (3rd Cir. 1981) *cert. denied* 455 U.S. 923. Jiles was a criminal case. It is inapposite to the issues involved in the instant appeal. Its reasoning has not heretofore been considered by this Court or applied to Civil Rights Act cases. Isolation of the single event of failure to certify was myopic and failed to acknowledge that petitioner has alleged the pattern of deprivations described throughout this petition. Failure to certify is merely a single instance.

The fact is that respondent Werblin, as chief executive, represents the official policy and position of the Sports Authority. Obviously, had the Sports Authority not been improperly dismissed (see points 1 and 2, *supra*) it would stand to be liable for the transcendent pattern of rights deprivations alleged in this action. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). Certainly, however, in its absence as a party, respondent Werblin should not be permitted a procedural escape from responsibility for the pattern over which he presided.

5. The scope of this Court's decision in *Parratt v. Taylor* with respect to the extent to which the availability of post-deprivation remedies may cure due process violations should be settled by this Court.

Respondents argued in the Circuit Court that petitioner had not stated a claim for § 1983 relief because it did not suffer a deprivation of property rights. See brief of Respondent Sports Authority below at p.44). This argument, based upon this Court's decision in *Parratt v. Taylor,* 451 U.S. 527 (1981), was premised upon the notion that even if petitioner suffered the deprivations about which it complained, it could have later been made whole in administrative and local judicial proceedings.

Parratt is clearly distinguishable, and its rule would be misapplied in this case. The alleged due process deprivation there involved the loss by prison officials of a hobby item mail-ordered by petitioner, an incarcerated prisoner. There was simply no way petitioner could have been granted pre-deprivation due process notice and hearing rights, since there was no way the state could have known that the loss would occur. *Parratt* should be limited to its facts. It obviously has no application in this case, in which petitioner contends that had petitioner been notified of the relocation rights available to it, it could have exercised those rights and avoided bankruptcy. See *Duncan v. Poythress,* 657 F.2d 691 (5th Cir. 1981) at 704. *Cert. granted* ____ U.S. ____; *cert. dismissed* ____ U.S. ____.

To suggest that post-deprivation relief would have sufficed for petitioner as this Court held would have sufficed in *Parratt,* is simply to rub salt into petitioner's wounds. Had petitioner known at the time it was displaced of the availability of advance payments in hardship cases and of the other benefits available to it, it would have been able to avail itself of such benefits and bankruptcy would not have been necessary.

Finally, unless this Court grants the writ and limits the scope of *Parratt* on the matter, there is a substantial danger that *Parratt* will be broadly misinterpreted to engraft an exhaustion

of remedies requirement upon 1983 claims, contrary to the repeated holdings of this Court that exhaustion is not a requirement.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: March 29, 1983

APPENDIX

New Jersey Eminent Domain Act of 1971

N.J.S.A. 20:3-19. Right to possession and vesting of title

A copy of the declaration of taking and notice of the filing thereof and of the making of the aforesaid deposit, shall be served upon the condemnee and all occupants of the property in accordance with the rules, and proof of such service shall be filed in the action. Thereupon, the right to the immediate and exclusive possession and title to the property described in the declaration of taking shall vest in the condemnor, free and discharged of all right, title, interest and liens of all condemnees without the necessity of further process provided however, that the court may, upon application and good cause shown, stay the taking of possession of the land or other property, or authorize possession to be taken upon prescribed conditions. A property owner who refuses to vacate said property or yield possession and remains in possession more than 20 days after service of notice shall be deemed a trespasser and shall be then liable for rents, issues and profits 20 days after service. The court, upon notice and after determining that the property owner has had adequate opportunity to obtain any funds payable to him under sections 23 and 26 of this act[1] and any other expenses to which he may be entitled to as a matter of law, shall enter an order for possession directed to the sheriff of the county in which the property is located. If the owner or tenant occupies the property with the condemnor's permission on a rental basis for a short term or for a period subject to termination on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short term occupier. Such right, title and interest shall be transferred and shall attach to the compensation determined to be payable hereunder, to the same extent and in the same order of priority as existed at the date of vesting of title in condemnor. The pendency of an appeal from an award of judgment hereunder shall not interfere with such vesting of title.

New Jersey Relocation Assistance Act of 1971

N.J.S.A. 20:4-4 Moving and related expenses

a. If a taking agency acquires real property for public use, it shall make fair and reasonable relocation payments to displaced persons and businesses as required by this act, for:

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the taking agency; and

(3) actual reasonable expenses in searching for a replacement business or farm.

N.J.S.A. 20:4-10 Authority of the commissioner

a. The commissioner shall adopt such rules and regulations as may be necessary to assure:

(2) that a displaced person who makes proper application for a payment authorized for such person by this act shall be paid promptly after a move or, in hardship cases, be paid in advance; and

New Jersey Relocation Assistance Act of 1967

N.J.S.A. 52:31B-5 Relocation assistance program; determinations; formulation and execution of program.

(a) Whenever any State agency or any unit of local government acquires or seeks to acquire any real property for public use, or implements or intends to implement a program of law enforcement, or initiates or intends to initiate a program or project for the voluntary rehabilitation of dwelling unit, the chief executive officer of any such State agency or unit of local government shall certify to the commissioner that a workable relocation assistance program for displaced persons and business concerns, offering the services prescribed by subsection (b) of this section, is available to reduce hardship to those affected. If the commissioner or the chief executive officer of any such State agency or unit of local government shall determine, in the exercise of their discretion, that the acquisition of real property for a public use or implementation of a program of law enforcement or the initiation of a program or project for the voluntary rehabilitation of dwelling units by any such State agency or unit of local government will cause substantial economic injury to persons and business concerns other than those persons of business concerns with relocation services pursuant to a workable relocation assistance program.

(b) Every workable relocation assistance program required by subsection (a) of this section shall include such measures, facilities, techniques or services as the commissioner may prescribe by rules and regulations issued and promulgated pursuant to this act, including, but not limited to, such measures, facilities, techniques or services as may be necessary or appropriate (1) to determine the needs of displaced persons and business concerns for relocation assistance to supply information concerning programs offering assistance to displaced persons and business concerns and to assist in minimizing hardships to displaced persons in adjusting to relocation; (2) to

assist each displaced person to secure decent, safe and sanitary dwelling units at prices or rents within his means and in areas reasonably accessible to his place of employment and not generally less desirable in regard to public utilities and public and commercial facilities; (3) to assist owners of displaced business concerns in obtaining and becoming established in suitable business locations; (4) to provide any displaced person or business concern a reasonable time from the date of displacement within which to apply for a relocation assistance payment required by section 4 of this act, and to encourage the prompt transmittal of any such relocation assistance payment upon proper application therefor; (5) and to provide for fair and reasonable relocation assistance payments pursuant to section 4 of this act; (6) to secure to the greatest extent practicable, the coordination of relocation activities with other project activities and other planned or proposed governmental actions in the community or nearby areas which may affect the execution of the workable relocation program.

(c) Within 60 days of the effective date of this act, any State agency or unit of local government which reasonably contemplates that any person or business concern may be displaced by the acquisition of real property for public use or the implementation of a program of law enforcement or the initiation of a program or project for the voluntary rehabilitation of dwelling units, shall designate or appoint an officer or employee therof who shall be charged with the formulation and execution of any workable relocation assistance program required by section (a) of this section. Any such State agency or unit of local government, acting through the officer or employee so designated or appointed, may utilize the facilities, personnel or services of any other officer or employee of said State agency or unit of local government, or may enter into appropriate contracts or agreements with any officer of the United States or any other State agency or unit of local government, or with any nonprofit organization, for the purpose of implementing any workable relocation assistance program.

N.J.S.A. 52:31B-6 Emergency or imminent hazard to public health, safety and welfare.

(a) No State agency or unit of local government shall, except in the case of an emergency or an imminent hazard to the health, safety and welfare of the public, displace or remove, or cause to be displaced or removed, any person or business concern on account of the acquisition of any real property for public use or on account of a program of law enforcement or on account of a program or project for the voluntary rehabilitation of dwelling units, unless (1) any workable relocation assistance program required by subsection (a) of section 5 of this act shall have been submitted to, and approved by, the commissioner; (2) the chief executive officer of said State agency or unit of local government shall have filed with the commissioner the certification required by subsection (a) of section 5 of this act; (3) an alternate dwelling unit as described in section 5(b) (2) of this act is available for each person displaced or removed, or caused to be displaced or removed; and (4) the commissioner shall have certified to the chief executive officer of said State agency or unit of local government that the provisions of this act have been complied with.

(b) Any State agency or unit of local government which, in the case of an emergency or an imminent hazard to the health, safety and welfare of the public, displaces or removes, or causes to be displaced or removed, any person or business concern on account of the acquisition of any real property for public use or on account of a program of law enforcement or on account of a program or project for the voluntary rehabilitation of dwelling units, shall do any and all things necessary and appropriate to provide, that, as soon after the displacement or removal of any such person or business concern as possible, (1) any workable relocation assistance program required by subsection (a) of section 5 of this act will be submitted to the commissioner the certification required by subsection (a) of section 5 of this act; (3) an alternate dwelling unit as described in subsection (b) (2) of section 5 of this act is

available for each person displaced or removed, or caused to be displaced or removed; and (4) the commissioner will certify to the chief executive officer of said State agency or unit of local government that the provisions of this act have been complied with.

New Jersey Tort Claims Act

N.J.S.A. 59:8—8. Time for presentation of claims

A claim relating to a cause of action for death or for injury to person or to property shall be presented as provided in this chapter[1] not later than the ninetieth day after accrual of the cause of action. After the expiration of 6 months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity if:

a. He failed to file his claim with the public entity within 90 days of accrual of his claim except as otherwise provided in section 59:8—9; or

b. Two years have elapsed since the accrual of the claim; or

c. The claimant or his authorized representative entered into a settlement agreement with respect to the claim.

Nothing in this section shall prohibit an infant or incompetent person from commencing an action under this act within the time limitations contained herein, after his coming to or being of full age or sane mind.

Rules and Regulations Adopted by Department of Community Affairs, Chapter VI, ¶ 78

STATE OF NEW JERSEY
DEPARTMENT OF COMMUNITY AFFAIRS

[SEAL]

Rules and Regulations Adopted by the Department of Community Affairs Pursuant to the Relocation Assistance Law of 1971 (P.L. 1971, C. 362)

PATRICIA Q. SHEEHAN
Commissioner

* * *

78. *PHYSICAL CHANGES AT NEW LOCATION.*

a. *Policy.* The cost of making physical changes in or to a building to which a business concern relocates may be eligible as a moving expense under the following provisions and limitations:

(1) *The physical changes must be necessary* to permit the reinstallation of specific items relocated or substitute machinery or equipment necessary to the continued operation of the business, or be required to meet local codes or ordinances related to the installation and use of the machinery or equipment.

(2) *The cost of foundations, concrete pads, or other similar construction* required for the reinstallation of relocated or substitute machinery or equipment may be eligible provided that the construction is necessary to the proper operation of the equipment, and compensation for a similar installation was not made to the business concern as part of the price paid to acquire the former property.

(3) *Changes in or to a building or structure* may not increase the value of the building or structure for general

purpose uses, may not increase the structural or mechanical capacity of the building or of its components beyond the requirements of specific types of equipment moved from the old location or replaced with a substitute, nor include building or structural alterations required by local building codes and ordinances, except if required for the installation of specific types of equipment moved from the old location or necessary for the continuation of the business. No relocation payment in connection with a change in or to a building or structure shall be made for any items for which compensation was made as an acquisition cost at the old location.

(4) *The local agency must receive prior DCA concurrence* in a determination that the physical changes are required by local law or ordinance or are necessary to reinstallation or reconnection of the equipment. If DCA concurrence is requested after a move has been completed and a relocation claim submitted, no portion of the claim related to the cost of the physical changes may be paid, prior to DCA concurrence.

(5) *The business concern must submit the following documentation* to the local agency:

(a) *A detailed description or drawing*, or both, of the installation in the former location.

(b) *A detailed description or drawing*, or both, of the installation as proposed or actually installed.

(c) *A copy of all instructional materials or drawings* to be provided to contractors or workmen.

(d) *A statement describing the basis for the estimated or actual cost* related to the physical changes.

(e) *A statement explaining why the changes are necessary* to reinstallation of the equipment.

b. *Local Agency Action.* In any case where it appears that physical changes must be made to a building, the business concern shall discuss its plan with the local agency before the move so that an agency determination of acceptability can be made. If the local agency finds that compensation for the changes may be eligible, DCA concurrence shall be obtained prior to the move. When the documentation described in subsection 78a(5) has been received, the local agency shall:

(1) *Review the documentation* and determine whether the physical changes meet the requirements set forth above, and whether the costs are reasonable.

(2) *Where applicable, secure an opinion of local agency counsel* stating that the changes are required by law. The opinions should include appropriate citations.

(3) *Assure that the value of any equivalent items* included in the acquisition payment made to the owner of the real property or to the business concern is excluded from the amount to be included in the relocation payment.

(4) *Submit to DCA the documentation received* from the business concern, together with the local agency's written recommendations.

(5) *Not make the payment until DCA concurrence is received* (see subsection 78a(4) above). (DCA will advise the local agency, in writing, of the results of its review.)

Rules and Regulations Adopted by Department of Community Affairs Chapter 2, 3(a)(3)

3. *THE RELOCATION PLAN.*

a. *Description of Administrative Organization.*

* * *

(3) Whether or not the agency responsible for the displacement administers relocation activities, the local agency has the obligation to assure that relocation assistance and payments are provided in accordance with State law and policies, standards, and regulations.

* * *

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

Decision of Chief Judge Clarisson F. Fischer dated February 9, 1981

THE COURT: That's right. That is the problem, although I don't know that he has got much of a case. I will put my reasons down. You don't have to argue this.

Defendant, New Jersey Sports & Exposition Authority et. al., moves this Court to dismiss plaintiff, Blazer Corporation's complaint for failure to exhaust state judicial and administrative remedies. Plaintiff asserts federal jurisdiction under 42 U.S.C. § 1983, alleging that defendant's actions under color of New Jersey laws N.J.S.A. 20:3-1 (Eminent Domain Act of 1971); N.J.S.A. 52:31B-1 (Relocation Assistance Act of 1967); and N.J.S.A. 20:4-1 (Relocation Assistance Act of 1971) caused plaintiff damages by forcing it to declare bankruptcy and suffer the total loss of it's business. Plaintiff argues that Defendant failed to follow New Jersey statutory procedure and thereby caused the alleged loss. Defendant points to a pending state court eminent domain action, *New Jersey Sports & Exposition Authority v. Blazer Corp.*, No. L-20951-72 (1973) and urges exhaustion of remedies before this Court takes jurisdiction. Plaintiff argues, however, that since they cannot seek destruction of business damages in the eminent domain proceeding in state court, and since the total loss of a business is compensable under § 1983, there is no need for exhaustion.

This case arises out of the following events. Plaintiff manufactured custom-built air conditioning systems at its 10.7 acre leased premises in East Rutherford, New Jersey. In 1973, defendant determined that plaintiff's leasehold was needed for a public purpose, to wit: the Meadowlands complex. Defendant filed a declaration of taking on March 20, 1973, placed $1,330,395.00 in the Superior Court Trust Fund for the value of the premises, and ultimately evicted plaintiff in August 1974. Allegedly, no relocation information or financial assistance for the move was offered plaintiff. This allegation is controverted by the defendant. Although the factual background contains more nuances, we save that for a later day since our concern is the immediate motion to dismiss.

There is no question that plaintiff's alleged damages from the destruction of it's business is an appropriate action under § 1983. *Lynch vs. Household Finance Corp.*, 405 U.S. 538 (1971). It cannot be doubted that among the civil rights intended to be protected from . . . state action . . . are the rights to acquire, enjoy, own and dispose of property. *Id.* at 544. The "dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights". *Id.* at 552. Defendant's actions under color of state law allegedly caused plaintiff to suffer destruction of it's business. Thus, a cognizable claim under § 1983 has been alleged.

Since plaintiff has alleged a valid § 1983 claim, there is generally no need to exhaust state administrative or judicial remedies. *Monroe v. Pape*, 365 U.S. 167 (1960); *McNeese v. Board of Education*, 373 U.S. 668 (1962); *Hochman v. Board of Ed. of City of Newark*, 534 F.2d 1094 (3d Cir. 1976); *United States ex. rel. Ricketts v. Lightcap*, 567 F.2d 1226 (3d. Cir. 1977). Relief under § 1983 may not be defeated because relief was not first sought under New Jersey law. *See McNeese, Supra* at 671. The federal remedy is supplementary to the state remedy. *Monroe, supra* at 183. Not only would the exhaustion requirement be inappropriate here, it would also defeat the purposes of § 1983 if held that assertion of a federal claim in federal court must await an attempt to vindicate the same claim in New Jersey court. *McNeese, supra* at 672. Further, *Elmwood Properties, Inc. v. Conzelman*, 418 F.2d 1025 (7th Cir. 1969) relied upon by defendant is inapposite. There, the plaintiff could litigate the building permit refusal in state court whereas plaintiff here cannot allege damages from loss of business in a New Jeresy eminent domain proceeding. *State v. Gallant*, 42 N.J. 583, 587 (1964); *State of New Jersey v. Cooper Alloy Corp.*, 136 N.J. Super. 560, 568 (App. Div. 1975). Thus, it would be tautological to require plaintiff to first seek state law remedies when such do not exist.

Nor is abstention proper. At it's core, abstention requires a federal court to refrain from deciding federal constitutional issues until related state law issues have first been adjudicated.

D'Iorio v. County of Delaware, 592 F.2d 681, 685 (3d Cir. 1978). In *D'Iorio* the Third Circuit set out the test for invoking the abstention doctrine:

> First, there must be uncertain issues of state law underlying the federal constitutional claim. Second, these state law issues must be amenable to an interpretation by the state court that would obviate the need or substantially narrow the scope of the adjudication of the constitutional claims. And third, it must appear that an erroneous decision of state law by the federal court would be disruptive of important state policies.

New Jersey provides a statutory framework from which condemnees such as plaintiff derive due process protection. That statutory scheme does not permit damages for destruction of business. *Gallant, supra.* Thus, there is not an unclear state law issue that would, if decided by the New Jersey court, obviate the need for the federal action. Further, plaintif alleges that under color of that statutory authority and by omission of duty, defendant forced plaintiff's business into bankruptcy. Since this claim is not cognizable in the New Jersey court proceeding and since plaintiff is not asking this court to interpret the New Jersey statute, there is no need to abstain under the *D'Iorio* test. Although I do not pass on the ultimate merits of plaintiff's complaint, I do hold that it is an appropriate § 1983 action and that exhaustion of remedies and abstention do not apply.

Defendant's motion to dismiss is denied. Plaintiff to submit an appropriate order within 5 days. No costs.

Thank you, gentlemen.

Decision of Judge Harold A. Ackerman dated November 16, 1981

THE COURT: This action arises out of the acquisition by the State of New Jersey through its agent, the New Jersey Sports and Exposition Authority (Authority) of land in East Rutherford, New Jersey for development as the Meadowlands Sports Complex.

Plaintiff is Blazer Corporation, which was located in East Rutherford at the time this cause of action accrued and was in the business of constructing specialized air-conditioning systems.

Defendants are the Authority and the individual members of the Board of Commissioners of the Authority. Plaintiff complains that it was dislocated in violation of the Relocation Assistance laws of 1967 and 1971, NJSA 52:31B-1 et seq., and NJSA 20:4-1 et seq., and in violation of the New Jersey Eminent Domain Act of 1971, NJSA 20:3-1 et seq.

Plaintiff alleges that it went into bankruptcy as a direct result of the illegal dislocation and the defendants therefore deprived it of its property without due process of law in violation of the Fourteenth Amendment. 28 U.S.C. Section 1331(a) and 42 U.S.C. Section 1983 are asserted as the basis of this Court's jurisdiction over this action.

I interpret the complaint as essentially basing jurisdiction on 28 U.S.C. Section 1343(3) and 42 U.S.C. Section 1983. There is also an allegation in the complaint that these acts violated plaintiff's right to equal protection of the laws of New Jersey under the United States Constitution and violated certain federal statutes regarding relocation.

Upon discovery that no federal monies were used in the Sports Complex project, plaintiff abandoned the federal statutory claims.

The case is before me today on several motions of the parties. Plaintiff Blazer Corporation moves for summary judgment on the issue of liability. Defendant Authority moves to dismiss the complaint as untimely.

The individual defendants moved that summary judgment in their favor is appropriate because the complaint fails to state a cause of action cognizable under Section 1983, plaintiff has failed to join necessary parties, and the nonliability of the individual defendants is beyond doubt.

These motions raise many difficult issues. For the reasons set forth, I will not reach all of the issues raised.

The following facts, however, are undisputed.

On March 20, 1973, the Authority filed a complaint in condemnation and a declaration of taking on the property leased to plaintiff in Bergen County Superior Court after a written offer had been rejected. The Authority has the power to acquire land through condemnation. NJSA 5:10-5(m) and exercised that power pursuant to the Eminent Domain Act, NJSA 20:3-1 et seq.

At the same time, the Authority deposited $1,115,000 as an estimated just compensation, and later supplemented it with an additional $214,395.

On November 12, 1973, Judge Trautwein entered an order after hearing motions by both parties to the condemnation proceeding allowing Blazer Corporation to withdraw the estimated compensation and setting February 1, 1974 as the date of vacation with certain conditions regarding the pro rata share of taxes and other expenses. By consent or court order, this date was extended several times until August 15, 1974.

The parties dispute whether the defendants fulfilled the legal prerequisites for the dislocation to take place on August 15, 1974.

However, it is also undisputed that in April of 1973, the Authority entered into a contract with the New Jersey Department of Transportation (DOT) to formulate and implement a relocation assistance plan for and on its behalf as allowed under the relocation statute and applicable regulations.

In accordance with this agreement, DOT established a relocation office on the Sports Complex site and developed a plan. The parties dispute whether this plan was properly certified, what assistance and expenses plaintiff was entitled to, and also

whether plaintiff was the recipient of any and all assistance and expenses it was entitled to.

The first of the motions that I will consider is the Authority's motion that the action is barred as untimely.

I have concluded that the complaint as to the Authority was not brought in time. Defendant Authority moves to dismiss the complaint against it on the grounds that the applicable Statute of Limitations is the two-year limitation for actions brought under the New Jersey Tort Claims Act. NJSA 59:8-8. That statute provides in pertinent part:

"The claimant shall be forever barred from recovering against a public entity if . . . (b) two years have elapsed since the accrual of the claim."

Plaintiff raises several arguments in defense of timeliness of the complaint. It argues first that defendant has waived the defense of limitations under Federal Rule of Civil Procedure 12(h)(1) by failing to plead the Tort Claims Act in its answer and by failing to raise it in the first pretrial motion filed by the Authority in this suit. Alternatively, Blazer argues that the applicable limitations period for a suit under Section 1983 is no less than six years. I am not persuaded by any of these arguments.

The defense of Statute of Limitations is an affirmative defense that must be raised in a responsive pleading, but Defendant Authority did so. The fact that it did not mention the Tort Claims Act by name is irrelevant.

Furthermore, this defense is not the kind of challenge to an action which is least favored under Rule 12, and which therefore must be raised at the initial stage of the proceeding or not at all.

Those challenges, such as improper venue or insufficient service of process, are expected to be raised at the earliest possible moment because they "can often be connected in a timely fashion." *Weaver vs. Bowers,* Slip Opinion No. 80-1245 (September 8, 1981, 3d Cir.). A statute of limitations defense is properly considered a species of the defense of failure to state a claim upon which relief can be granted. *See Bethel v. Jendoco*

Construction Corporation, 570 F.2d 1168, 1174 (3d Cir. 1978); 5 Wright and Miller, Federal Practice and Procedure, Section 1360. Therefore, the motion can be considered at this juncture. See Federal Rule of Civil Procedure 12(h)(2).

Congress has not provided a limitations period for actions brought under the Civil Rights Act. Therefore, federal courts apply to a Section 1983 action the State Statute of Limitations that would be applicable "had an action seeking similar relief been brought under state law." *See Polite v. Diehl,* 507 F.2d 119, 122 (3d Cir. 1974) (en banc).

Our selection requires both a characterization of the nature of the federal claim and an examination of the New Jersey law on limitations periods. In our circuit, the district courts may give separate treatment to different aspects of the same complaint. *See Davis v. United States Steel Supply,* 581 F.2d 355, 342, Note 8 (3d Cir. 1978).

I find that it is appropriate to consider the claims against the Authority distinct from those against the individual defendants.

In *Meyers vs. Pennypack Woods Home Ownership Association,* 559 F.2d 894, 901 (3d Cir. 1977), the court of appeals identified three perspectives that should be utilized to analyze the federal claim: (1) the defendants' conduct; (2) the plaintiff's injury; and (3) the relief requested.

As plaintiff admits, the Authority's alleged conduct that is the source of his complaint is a violation of statutory mandates. The Authority will be liable, if at all, because of its official misconduct. Furthermore, in examining the other *Meyers* elements, I find the plaintiff seeks damages for tangible injuries to his asserted rights to lawfully pursue his business until lawfully evicted.

As plaintiff's complaint sets forth, it claims that the defendants "deprived the plaintiff of its ability and means to carry on its business, causing extreme damage to business and property." See Paragraph 49.

Also, as in *Meyers,* the wrong plaintiff complains cannot be read as arising out of a contract with the defendants. In

Meyers, where the injury complained of was the refusal to contract for the sale of a house in violation of 42 U.S.C., Sections 1981 and 1982, the court stated:

"Although the complaint may be read as alleging a wrongful refusal to enter into a contract, it cannot possibly be construed as alleging the breach of any existing contract. Meyers' cause of action arises not from a breach of promise, but from a breach of duty. It must therefore find its analogy in some sort of action in tort." See 559 F.2d at 901.

The complaint by Blazer Corporation sounds most like the tort recognized in New Jersey of unjustified interference with right to pursue lawful business relations. *See Middlesex Concrete Products and Excavating Corporation vs. Carteret Industrial Association,* 37 N.J. 507 (1962).

As I indicated, the complaint sounds most like this tort, except that as plaintiff admits, the defendant's interference would have been justified under principles of eminent domain absent the relocation statutes. For these reasons, I have concluded that the claim against the Authority is most appropriately characterized as a claim for tortious injury to property at the hands of a public authority.

I must next examine the New Jersey Statute of Limitations scheme in order to find the proper analogy for the civil rights injury just characterized.

While the applicable Statute of Limitations for a Section 1983 suit is a matter of federal law, I am persuaded by the reasoning of a New Jersey court that held in an employment discrimination suit against a municipality under Section 1983 that constitutional injuries were covered by the New Jersey Tort Claims Act. *See Lloyd vs. Borough of Stone Harbor,* 179 N.J. Super. 496 (Law Division 1981).

In Lloyd, the court found the two-year period applicable to the claim against the municipality even while finding the New Jersey general six-year limitations period for torts other than personal injuries applicable to the civil rights suit as against the individual officials. Judge Gerry in this district has also found the two-year Tort Claims Act limitations period applicable to a

Section 1983 suit. *See Gipson vs. Township of Bass River,* 82 FRD 122 (D.N.J. 1979).

Plaintiff argues, however, that the Authority, unlike the municipalities in *Lloyd* and *Gipson,* is not a "public entity" for purposes of the Tort Claims Act, and therefore that Act's limitations period should not be borrowed.

In support for its proposition that the Authority is not covered under the Act, plaintiff points to the Authority's power to sue or be sued. NJSA 5:10-5(a) and the exclusion of "any such entity which is statutorily authorized to sue and be sued" from the Tort Claims Act's definition of "state." NJSA 59:1-3.

Blazer cites to the New Jersey Supreme Court decision in *Bell vs. Bell,* 83 N.J. 417 (1980), to support the agreement that the Authority is not a "public entity." While Blazer's argument is not without appeal, my research reveals that it has misread *Bell* and failed to account for the cases that clearly bring the Authority within the meaning of "public entity."

The Tort Claims Act defines "public entity" to mean the State, and any county, municipality, district, public authority, public agency and any other political subdivision or public body in the state. N.J.S.A. 59:1-3. The Act defines "State" to include the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued.

In *Bell,* the New Jersey Supreme Court held that the Delaware River Port Authority (DRPA) is a bi-state agency with the power to sue and be sued "arguably, could come within the definition of a 'public entity.' " The Tort Claims Act "is a comprehensive legislative enactment governing the immunity and liability of the state and public entities in the state" that modifies the waivers of sovereign immunity found where there is a power to sue or be sued. *See* 83 N.J. at 425. However, as a bi-state agency, the New Jersey Legislature "does not have the power to modify by unilateral action waiver of sovereign immunity set forth in the bi-state compact." See 83 N.J. at 424. In reaching its decision in *Bell,* the New Jersey Supreme

Court did not read the definition of "State" as incorporated into the definition of "public entity," as plaintiff here suggests.

In *S. E. W. Friel Company vs. New Jersey Turnpike Authority*, 73 N.J. 107 (1977), the Supreme Court of New Jersey explicitly considered the relationship between these two definitions contained in the Tort Claims Act.

The court stated, quoting Judge Breslin in *Wade v. New Jersey Turnpike Authority*, 132 N.J. Super. 92, 97-98 (Law Division 1975), "Unless a moving party can demonstrate that the Turnpike Authority is an office, department, division, bureau, board, commission or state agency, then the said exclusion contained in the definition of 'State' does not apply to the Turnpike Authority. On the other hand, the Turnpike Authority clearly fits under the definition of 'public entities," namely as a public authority." See page 116 of the *Friel* opinion.

The court relied also upon the official comment to Section 59:1-3, which stated, "The definition of 'public entity' provided in this section is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to *all entities exercising governmental functions*." See 73 N.J. at 116.

The Sports Authority is similar to the Turnpike Authority in that: "The Authority is hereby constituted as an instrumentality of the State exercising and essential governmental functions." See N.J.S.A. 5:10-4.

I therefore must conclude that the New Jersey Supreme Court would find the defendant Authority to be a public entity encompassed within the New Jersey Tort Claims Act. Hence there is nothing to prevent me from borrowing the two-year Statute of Limitations of the Act for a Section 1983 action against the Authority which, for the reasons outlined earlier, is the most appropriate State Statute of Limitations.

The complaint against the Authority, having been filed nearly six years from the date the cause of action accrued, must be dismissed. However, I will not dismiss the complaint as against the individual officials as untimely, because, as Lloyd, *supra*, held, the Tort Claims Act's limitations period does not apply to suits brought against public officials.

I find the general six-year statute, N.J.S.A. 2A:14-1 most appropriate for this action against the individuals because it states a claim most analogous to an unjustified interference with business tort, as the Meyers analysis earlier indicated.

I next address the individual defendants' motion to dismiss the complaint for failure to specify the conduct of each defendant plaintiff believes caused his injury under *Rotolo vs. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976).

The standard of review on a motion to dismiss for failure to state a claim upon which relief can be granted is whether plaintiff can prove any set of facts which would entitle it to the relief it seeks. See *Jamieson vs. Robinson*, 611 F.2d 138 (1981). However, where matters outside the pleadings are presented to the court, a Rule 12(b)(6) motion is to be treated as one for summary judgment under Rule 56.

I have concluded that the plaintiff has not pleaded a cause of action under Section 1983 arising out of the due process clause of the Fourteenth Amendment with sufficient specificity. But I will not grant summary judgment. Rather, plaintiff will have an opportunity to amend.

Section 1983 provides:

"Every person who, under cover of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The elements which plaintiff must prove in order to state a claim under Section 1983 for deprivation of property without due process are:

(1) Defendants acted under color of state law;
(2) Which action amounted to a deprivation;
(3) Of plaintiff's property; and
(4) Without due process of law.

In this point of their brief, the members of the Authority claim that the complaint fails to inform them of the actions they took on their omissions to act that constituted a breach of

duty and that allegedly deprived the plaintiff of his property without due process of law. I must agree with them.

The Third Circuit requires that civil rights complaints contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs. *See Ross vs. Meagan*, 638 F.2d 646 (3d Cir. 1981).

On examination of the complaint, I find that the individual defendants are not treated as individuals, but are lumped together with the Authority as "defendants." *See Shirey vs. Bensalem Township*, 501 F. Supp. 1138, 1144 (E.D.Pa. 1980).

In the interrogatories served on plaintiff by the defendants, the only specific action or admission which is attributable to an individual defendant is the failure to certify the Workable Relocation Assistance Plan (WRAP) through submission of the DCA Forms 101 and 102. Defendants have a right to know whether plaintiff will rest his case solely on these actions.

There is also an allegation that a booklet distributed by the Authority misrepresented the benefits plaintiff might be eligible for. This booklet was obviously written or approved by some person, but the plaintiff does not specify which, if any of the defendants, did so.

However, this is the kind of information peculiarly in the possession of the defendants and not the plaintiff. Therefore, plaintiff's answers to defendants' interrogatories are not a sufficient factual basis on which to grant defendants' summary judgment.

Even though I am granting plaintiff an opportunity to amend the complaint, I feel compelled to remind them that liability under Section 1983 cannot be predicated on judicial notions of respondeat superior. *See Hampton vs. Holmesburg Prison Officials*, 546 F.2d 1077 (3d Cir. 1976).

The administrative officers of the Authority have a good faith immunity and can only be liable if they "played an affirmative role in the deprivation of the plaintiff's rights, i.e., there must be a causal link between the actions of the responsible officials named and the challenged misconduct." *See Commonwealth of Pennsylvania vs. Porter*, 642 F.2d 687, 696 (3rd Cir. 1981). *See* also *Rizzo vs. Goode*, 423 U.S. 362, 375 (1976).

While the defendants move to dismiss the complaint on the ground of vagueness, granting plaintiff an opportunity to amend its complaint is not inconsistent with the goal of specificity because it works to insure that legitimate claims be heard. *See Rotolo* cited *supra*.

In light of my decision, I do not reach plaintiff's motion for partial summary judgment or the remainder of the motions raised by the individual defendants.

I will deny these motions without prejudice to the right of the parties to renew any aspect of them if they choose to do so, after an amended complaint is filed.

Plaintiff will have 30 days from the signing of the order to file an amended complaint. If it does not do so, the entire complaint will be dismissed.

Mr. Ward, may I ask you to draw an order in conformance with my decision here this afternoon.

Decision of Judge Harold A. Ackerman dated March 1, 1982

Now, the individual defendants today argue on their present motion that they are entitled to judgment as a matter of law because the complaint fails to set forth a claim upon which relief can be granted because they are protected by a qualified immunity because the action is barred by the statute of limitations.

They have also moved for attorneys' fees, pursuant to Section 1988. Plaintiff has denied that the defendants are entitled to relief on any of these grounds, and further asserts that it is entitled to judgment because the defendants are culpable as a matter of law. Because both parties have submitted to the Court matters outside the pleadings, I will consider these motions under Federal Rule of Civil Procedure 56 standards.

On a Rule 56 motion I must give the party opposing the motion the benefit of all reasonable factual inferences, and I may grant summary judgment only if there are no genuine issues of fact.

As a moving party, or I should say, the moving party is entitled to judgment as a matter of law. See *DeLong Corporation v. Raymond International,* 622 F.2d 1135 (3rd Cir. 1980). For the reasons I will set forth in a moment, I am granting defendant's motion and dismissing plaintiff's complaint, but denying defendant's request for fees.

Today the defendants have once again raised the spector of time in this matter. On November 16, 1981, I ruled that the statute of limitations applicable to this 1983 claim was the two-year New Jersey Tort Claims Act. With respect to the Authority, and the six-year general period, N.J.S.A. 2A:14-1, with respect to the individual officials.

See *Meyers v. Pennypack Woods Home Ownership Association,* 559 F.2d 894, 901 (3rd Cir. 1977). I stated that the complaint, having been brought within six years of the date Blazer Corporation was moved out of its location, was timely as to the individual defendants.

During the hearing in the fall, none of the parties suggested any other date as the time the cause of action accrued, and I assumed the August 15, 1974 date was the day which required my analysis. Today it has been suggested that plaintiff's cause of action accrued and the six-year statute began to run at the latest as of Judge Trautwein's final order of July 16, 1974, directing plaintiff to vacate its premises and possibly as early as the November 12, 1973 order of Judge Trautwein.

While I have reconsidered my previous assumption that August 15, 1974, started the clock running, I am not persuaded by defendant's argument.

Under New Jersey law, "A plaintiff's cause of action accrues for limitation purposes when he suffers actual consequential damage or loss from the defendant's negligence." See *Rosenau v. City of New Brunswick,* 51 N.J. 130 (1968); see also *Cappadona v. Eckelmann,* 159 N.J. Super. 352 (App. Div. 1978).

In the instant case the alleged unconstitutional conduct is the failure of the defendants to assist plaintiff in relocating to make payments due it prior to plaintiff's dislocation, and to inform plaintiff of how to take advantage of the relocation services available.

If plaintiff has a cause of action under Section 1983 at all, the actionable injury arose when plaintiff was dislocated. The alleged injury to plaintiff's property right to pursue a lawful business without unjustifiable interference occurred not when the Authority acquired Blazer's property or when it set the date for displacement, but when it displaced Blazer without, according to it, all the predisplacement rights under the Relocation Assistance Acts.

Under the 1967 Act, "Displaced" means "required to vacate any real property or any tenancy therein pursuant to any lawful order or notice of any state agency. . ." N.J.S.A. 20:4-3(c).

As I read plaintiff's complaint, but for the alleged failure to comply with the acts, the Authority's taking and dislocation would have been a justifiable interference with its property right under the Eminent Domain Act. The defendants could

have given to plaintiff that which was allegedly due at anytime between the November court order and the August dislocation.

Therefore, I find that the appropriate date for marking the accrual of this cause of action is August 15, 1974. Plaintiff's complaint against the individual Authority officials is therefore timely.

Defendants also argue that they are entitled to summary judgment because the amended complaint fails to state a claim under Section 1983 against these officials. They contend that the allegations contained in the complaint are based predominantly on the oversight or supervisory responsibilities of these defendants who are the highest officials in the Authority. As such, they are not the affirmative acts required for Section 1983 actions. See *Rizzo v. Goode,* 423 U.S. 362 (1976).

The only direct affirmative act or omission alleged by the plaintiff, according to defendants, is the failure of Defendant Werblin as the Chief Executive Officer of the Authority to sign and forward the DCA assurance forms referred to as Form DCA-101-Guideform assurance with respect to P.L. 1967 C.79 and P.L. 1971 C.362, and Form DCA-102-Guideform assistance with respect to Relocation Requirements P.L. 1967 C.79 and P.L. 1971 C.362.

With respect to this allegation, defendant Werblin argues that his failure is not unlawful under the 1971 Act, or is at most a *de minimus* violation from which Blazer suffered no actionable harm.

Plaintiff defends the sufficiency of its amended complaint by pointing to numerous alleged affirmative duties and derelictions of these duties which directly caused plaintiff's loss of property.

The amended complaint includes allegations of the defendants unlawfully delegated their responsibilities under the Relocation Acts to the Department of Transportation, that the defendants failed to give the plaintiff the required 90-day written notice, that the defendants failed to obtain the approval of the DCA Commissioner of the Workable Relocation Assistance Plan (WRAP), and that the defendants failed to incorporate into the WRAP all the necessary policies, and that

the defendants had direct or constructive knowledge of the unique circumstances of the plaintiff's business, qualify it as a hardship case.

Plaintiff asserts that these allegations bring the claim within the requirements of Section 1982, under *Hague v. CIO,* 307 U.S. 496 (1939) and *Black v. Stephens,* 662 F.2d 181 (3rd Cir. 1981).

My review of all the papers filed on these motions and on the earlier summary judgment motions leads me to believe that the constitutional questions presented are difficult, and to some extent, novel. Namely, this case raises the issue whether every violation of state law also constitutes a constitutional or deprivation of due process. See *U.S. v. Jiles,* 658 F.2d 194 (1981). Because this is a novel question, I will consider the other avenues of argument raised by the parties first in order to obviate, if possible, the need to reach it.

Section 1983 provides in pertinent part:

> "Every person who, under color of law subjects or causes to be subjected, any. . .person within the jurisdiction of the United States to the deprivation of any rights. . .secured by the Constitution and laws shall be liable to the party injured in an action at law or suit in equity. . ."

I must first determine whether, assuming arguendo, that the alleged actions constitute constitutional deprivations, these defendants subjected or caused to be subjected the plaintiff to such deprivations.

This clause in Section 1983 has been construed to include only a person's own conduct or participation in a pattern of violation by virtue of knowledge, acquiescence, support and encouragement.

See *Rizzo v. Goode, supra,* and *Black v. Stephens, supra.*

Plaintiff's principal allegations concern the failure of defendants to inform plaintiff as to the availabilty and professing of relocation benefits. I have not considered the alleged denial of benefits to the part of liability phase of this case for the reason that plaintiff never applied for them. The process that was due

plaintiff and which allegedly was denied it was the accessibility to the application process.

The facts presented on these motions viewed most favorably to the plaintiff show the following:

Plaintiff received a DOT pamphlet called "If I Must Move," which failed to incorporate all the requisite information; for example, it failed to specify that the hardship cases could, upon application, receive advance payments.

Plaintiff was never presented with potential relocation sites or with financial or technical assistance in adopting any relocation site to fit its special needs.

The WRAP prepared by DOT on behalf of the Authority and never certified (which allegation I will address in a moment) did not contain a proper eviction policy.

I find that the acts of which plaintiff complains, assuming that they are constitutional torts, were the acts of employees and agents of these defendants. The defendants are essentially the Board of Trustees for the Authority.

The plaintiff has alleged only that the powers of the Authority vest in them, that the responsibilities under the Relocations Acts are mandatory and that they had direct or constructive knowledge of the unique circumstances of plaintiff's business. To hold these defendants liable for the actions of the Authority, or DOT employees, under these circumstances, is to base liability, in my judgment, on the Doctrine of *respondeat superior.*

A liability under Section 1983 cannot be predicated on notions of *respondeat superior.* See *Hampton v. Holmesberg Prison Officials,* 546 F.2d 1077 (3rd Cir. 1976).

Liability under Section 1983 can be predicated on the failure of high officials to properly supervise their employees, but only where there is found a policy on the part of high officials of encouragement and acquiescence in the constitutional violations of their employees. See *Commonwealth of Pennsylvania v. Porter,* 659 F.2d 306 (3rd Cir. 1981). However, such is not the case here, even when the facts are viewed under summary judgment standards.

This is not the case of a police chief who conveniently ignores citizens' complaints of the use of excessive force by

police officers brought to his or her attention time after time. See *Porter, supra.* Here, even if defendants knew that the nature of plaintiff's business involved unique structural circumstances, there are no facts in the record that even hint that these defendants were not entitled to assume that their employees were properly administering to plaintiff's needs. *C.F. Watson v. Interstate Fire Casualty Company,* 611 F.2d 120 (5th Cir. 1980).

Therefore, defendants are not persons who have subjected or caused to be subjected the plaintiff to a deprivation of any rights to relocation assistance, even assuming these rights are constitutionally protected.

If the allegations that are not clearly predicated on supervisory responsibilities, two must be dismissed on the basis that the undisputed evidence proves that the defendants did not violate the Relocation Acts. Plaintiff has complained that the defendants unlawfully delegated its responsibilities under the Acts to the Department of Transportation. However, the Act itself anticipates that state agencies will share resources and expertise in implementing and carrying relocation programs. N.J.S.A. 20:4-11 provides in part:

> "In order to prevent unnecessary expense and duplication of functions and to promote uniform and effective administration of relocation assistance programs for displaced persons, the Commissioner may authorize any taking agency to . . . carry out its functions under this Act through any state agency or instrumentality having an established organization for conducting relocation assistance programs."

On April 25, 1973, the Authority, by Defendant Werblin, entered into a contract with the New Jersey Department of Transportation which has "the required organization and the special professional expertise" to accomplish relocation assistance on behalf of the Authority.

The act by Defendant Werblin of contracting with the Department of Transportation was therefore lawful. Under the contract, the DOT was to "exclusively provide all areas of

relocation assistance" while the Authority was to handle the legal acquisition, condemnation and eviction matters. Even though, the Authority was ultimately responsible for the actions of the Department of Transportation personnel as its agents. See DCA Regulations, Chapter 2, Paragraph 3. These defendants are not liable on this basis under Section 1983 for the negligence of field officers and DOT employees for the reasons already annunciated.

I have also determined that the notice of dispossession provided to plaintiff was sufficient as a matter of law. While the DCA regulations require 90-day written notice, I find that the November 12, 1973, court order entered by Judge Trautwein which specified February 1st, 1974, as the date by which plaintiff was to vacate the premises, constitute more than adequate notice.

Actually, plaintiff was on notice for more than nine months, when one takes into consideration the extensions consented to in writing by the Authority and the amended orders of Judge Trautwein.

I therefore find that no state law violation incurred in this regard, and accordingly, no constitutional violation.

The plaintiff's complaint, therefore, falls or stands on its allegation that Defendant Werblin violated Blazer's due process rights by failing to submit the DCA Forms of Assurance 101 and 102. Defendants suggest that the 1971 Act does not make this a legal requirement, although the 1967 Act does. See N.J.S.A. 52:31-B-5, and that therefore the failure to certify cannot be a basis for Section 1983 liability. I do not agree. The WRAP itself specifies with respect to these assurances:

> "The Sports and Exposition Authority attorney will separately arrange as an integral part of this plan to submit to the Commissioner of Community Affairs the assurances required in form DCA-101-Guideform assurance with respect to P.L. 1967 C.79 and P.L. 1971 C.362—and DCA Form 102-Guideform assistance with respect to relocation requirements P.L. 1967 and P.L. 1971 C.362.

This is in accordance with DCA regulations which sets out in its introductory paragraph that "governmental agencies are subject to the relocation provisions of the Relocation Assistance Acts of 1967 and 1971 (P.L. 1967, Chapter 79, and P.L. 1971, Chapter 362). These regulations are promulgated pursuant to the legislation. See N.J.S.A. 52:31B-10 and N.J.S.A. 20:4-10. I therefore find that the certification by the Chief Executive Officer of the taking agency, in this case, Defendant Werblin, is required under the Acts.

I am therefore faced with determining whether this violation by defendant of state law rises to the level of constitutional error.

In *Jiles*, cited *supra*, as I pointed out earlier during the colloquy, the Third Circuit began to shape the contours of this area of constitutional law. When Judge Hunter, speaking for the court, said:

> "In determining whether the violation of a particular state law deprived a defendant of his due process rights . . . we must ascertain whether the state law directly conferred a substantive right on the defendant or merely created an administrative plan to help the state regulate its officers' conduct." See page 200 of that opinion.

At issue in *Jiles* was a state procedure to protect juveniles from having their criminal records released to the public. The statute included a court procedure for intra-law enforcement agency relief. The Third Circuit, holding that the use of a photograph in a photo spread identification without having obtained a court order did not violate the appellee's constitutional rights, stated:

> "This safeguard, while helpful to the state in ensuring that such records would not be released to the general public, did not create a property interest on behalf of the appellee."

Here the statute created a procedure to protect dislocated persons and business concerns from unfair or inequitable relocation. See N.J.S.A. 20:4-2.

The DCA forms 101 and 102 are the same kind of procedural safeguard as was at issue in *Jiles*. There can be no doubt that a WRAP was promulgated by DOT under contract to the Authority, and that it was implemented to some degree at least. The WRAP was submitted to the Commissioner of DCA pursuant to the Acts who found that "the manner in which you propose to relocate persons displaced and the resources available for their relocation comply with the requirements of the Relocation Assistance Law of 1971 and the regulations promulgated thereunder." See letter from Commissioner Kramer to James Hyde, dated July 20th, 1973. The Commissioner concluded the letter by saying that the approval of the WRAP is contingent on the submission of these forms.

For summary judgment purposes, the evidence does not show that the forms were ever submitted. However, I do not find that plaintiff had a property interest in this safeguard. It was the intention of the Acts that relocation of plaintiff proceed pursuant to a WRAP, but one was prepared for the Authority and implemented. The signature of Defendant Werblin on these forms can only be deemed part of "an administrative plan to help the state regulate its officers' conduct." See *Jiles* at page 200.

To say that but for these forms, the field officers would have properly informed plaintiff of its rights under the Acts and but for this, plaintiff would not have been unprepared financially and physically to relocate is to travel down the same supervisory road covered before.

I find that the Defendant Werblin did not commit a constitutional tort.

In sum then, I have determined that the amended complaint was filed timely, but that it fails to state a claim cognizable under Section 1983 against these defendants because, one, these defendants did not personally perform the administrative functions of informing the plaintiff of available relocation assistance benefits, two, they did not as supervisor acknowledge, encourage or support a pattern or practice of constitutional violations; and three, Defendant Werblin's delegation of the relocation program responsibilities to DOT was lawful;

four, Defendant Werblin's violation of the certification requirement does not constitute a constitutional violation.

However, I will not grant attorneys' fees to the defendants. The Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. Section 1988 provides that a court "in its discretion may allow the prevailing party. . . a reasonable attorneys' fee as part of the costs."

The term "prevailing party" includes defendants, but Congress has indicated that "defendants should be entitled to attorneys' fees only if the action is vexacious and frivolous, or if the plaintiff instituted solely to harrass or embarrass the defendant."

See Note, 80 Columbia Law Review 346, 354 (1980). See also *Christiansburg Garment Company v. EEOC*, 434 U.S. 412, 421, which I note is a case decided prior to the promulgation of Section 1988, but the same standard is utilized under 1988 as is utilized under the EEOC.

As I have already stated, plaintiff's complaint raised difficult and unsettled questions of constitutional law.

In my discussion, the equities do not counsel granting fees to these defendants.

Mr. Nowak, I will ask you to prepare an appropriate order in conformance with my determination here today. Thank you.

MR. NOWAK: Yes, your Honor. Thank you.

Judgment of the Court of Appeals for the Third Circuit dated December 2, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5239

BLAZER CORPORATION,

Appellant

—vs.—

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. MCCRANE, and "JOHN DOES," said names being fictitious

(D.C. Civil No. 80-2587)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY - NEWARK

ARGUED NOVEMBER 19, 1982

Before:

GIBBONS, HIGGINBOTHAM and BECKER,
Circuit Judges.

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Attorneys for Appellees, Werblin, Serraino, Foley, Kugler, Lewis and McCrane

JUDGMENT ORDER

Blazer Corporation appeals from a final order granting summary judgment against it on its Section 1983 complaint against the New Jersey Sports and Exposition Authority and certain of its officials. Since the complaint fails to state a cause of action for violation of that section, it is

ORDERED, ADJUDGED and DECREED that the judgment be and is hereby affirmed.

Costs are taxed in favor of appellees.

BY THE COURT,

/s/ JOHN GIBBONS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Sally Mrvos, Clerk

Dated: Dec. 2, 1982

Order Denying Motion for Hearing En Banc dated December 29, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5239

BLAZER CORPORATION,

Appellant,

—VS.—

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. MCCRANE, and "JOHN DOES,", said names being fictitious,

(D.C. Civil No. 80-2587)

SUR PETITION FOR REHEARING

Present:

SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS,
HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ JOHN J. GIBBONS
Judge

Dated: Dec. 29, 1982